First Principles.

NATIONAL SECURITY AND CIVIL LIBERTIES

APRIL 1977 VOL. 2, NO. 8

Reconstitutionalizing the Grand Jury

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The Intelligence Program of the Grand Jury

Cloaked in legitimacy, but combining the functions of the anti-subversive Congressional investigating committees and the FBI's COINTELPRO, the grand jury is one of the Executive's most powerful and durable weapons against dissent. Grand juries are the engine of a vast system of political intelligence-gathering. Subpoenaed witnesses are asked to name names, repeat what occurred at formal and informal meetings, catalogue people's whereabouts, thoughts, travels, and relationships—political, personal and sexual.

However, the grand jury's intelligence gathering function reaches far beyond those subpoenaed. Grand jury abuse is characteristically attended by the flooding of the targeted community with FBI or other federal agents. By threatening subpoena, agents gain entry into homes and the cooperation of reluctant interviewees; when the FBI descended on the women's movement communities in Lexington, Kentucky and New Haven, Connecticut, hundreds were intimidated into giving interviews. Subpoenas went only to the ten who held fast to their right to silence. For everyone, the ordinariness of everyday life was immediately shattered. By usurping the grand jury's subpoena power, "law enforcement" provides the executive a despotic power to coerce information—a power which Congress has consistently refused them.

Empowered to turn a participant to every conversation into an informer, the grand jury generates suspicion, dividing friends, co-workers, communities, and even families. People question why a person was selected for subpoena, and what, if anything was said in the interminable minutes during which a witness was alone behind the closed doors of the grand jury room. As to those not formally subpoenaed, one wonders what was said, however unwittingly, to the agents. The government may subpoena actual informants to clear them of possible sus-

It is at all times necessary, and more particularly so during the progress of a revolution and until right ideas confirm themselves by habit, that we frequently refresh our patriotism by reference to first principles.
THOMAS PAINE

picion, as was done in the VVAW-8 case; or by delaying a witness in the jury room or inexplicably dropping the subpoena the prosecutor may lead associates to believe an innocent friend to be an agent, just as did COINTELPRO's "snitch jacket."[1] The substitution of wariness for trust in the relations of everyday life is a legacy of the FBI-grand jury onslaught.

Grand jury proceedings are also used to divert constructive political energy into all-consuming legal defenses, disrupting on-going work. Subpoenas, timed to interfere at critical moments in organizing activities, force people to travel great distances from their homes and communities, and remove leadership by jailing them for contempt. Just as in 1972 when Irish unification supporters were dragged to Texas by subpoena, today Chicano activists from New Mexico are being subpoenaed to Chicago and New York. Although allegedly rejected by Attorney General John Mitchell, G. Gordon Liddy's plot to kidnap organizers planning to demonstrate at the Republican Convention was effectively carried out through a grand jury in Tallahassee which, by issuing subpoenas, spirited away 23 VVAW organizers and demonstrators from the convention site in Miami. For over a year, the resources of VVAW were poured into defending against the subpoenas and a spurious indictment.

Often striking those on the fringes, the grand jury exacts an enormous price for free expression and association. Its message: if you get too close to anyone or anything remotely political, you'll have to choose between informing and resisting. Resistance means a court battle, publicity, imprisonment, implication of criminal involvement, loss of privacy and job, and harassment of friends and family.

Perhaps the greatest danger to civil liberties is the use of the grand jury to fulfill COINTELPRO's objective to "disrupt, discredit and neutralize" legitimate political activity by labeling it as "criminal" or "terrorist." Mere issuance of the subpoena plants the suspicion. Judicial approval, taking "the Fifth," refusing to answer carefully framed questions about criminal conduct, and incarceration for contempt all serve to legitimize the equation of ideology and terrorism. The grand jury investigation is played and replayed in the press and spurious indictments may issue. For example, when the Puerto Rican Socialist Party (PSP) was running candidates in the 1976 elections on the island, an independentista's plea of the Fifth and refusal to testify before a grand jury which was allegedly investigating a theft of explosives was prominently reported in the press. The publicity about his refusal resurfaced just before the government was to try an explosives indictment against a PSP member. Although the indictment was dismissed for prosecutorial misconduct on the first day of trial because the government could not prove a theft had occurred, the jury panel's answers to the *voir dire*[2] demonstrated that the public had made the desired connection between PSP and terrorism.

Finally, the grand jury gives the prosecutor the power to jail resistors and activists for long periods, bypassing indictment, the burden of proving guilt, trial by jury, and the panoply of constitutional safeguards afforded defendants who have been actually accused of crime.

Legitimating Myths

The grand jury's power exceeds and outlives that of other intelligence programs because it is mythologized as legitimate and democratic.

The accoutrements of a lawful process veil and enhance the grand jury's threat. Unlike other intelligence programs, the subpoena is not a surreptitious device; it is an overt and apparently lawful process of the court. It invades privacy, thoughts, homes and relationships without the inconvenience or violence of raw physical entry. All this is done in the name of an allegedly legitimate investigation of criminal activity, yet the criminal act alleged to be investigated may be real, fabricated, or engineered by the government itself. The government need not show any connection between the witness and the criminal act, but conviction by subpoena is virtually guaranteed because of the damage to reputations.

This power both to stigmatize and probe is wielded through the instrument of an unrepresentative, manipulated, and ignorant grand jury, totally dominated by the prosecutor. The dangers of secret inquisitions are excused, however, because it is said to provide a community presence; the refusal to cooperate brands one as an enemy of the people.

The grand jury thus provides a perfect cover for political intelligence. Draping the mission of law enforcement in an apparently lawful "people's" institution, the modern grand jury is far more resistent to repudiation and constraint than were its predecessors. Because of its historical cloak, grand jury abuse has escaped the broad-based public condemnation dealt to similar intelligence practices by other agencies, and it is not discussed in the reports of either Senate or House committees investigating intelligence agencies.

Moreover, the Supreme Court's activist conservative majority has facilitated the absorption of the grand jury into the machinery of law enforcement, legitimizing its transformation from an accusatorial shield into a modern inquisition.

The Grand Jury As Constitutional Loophole

As currently used, fundamental constitutional safeguards of the accusatorial system have been eliminated, and there is no check on the misuse of the subpoena power of the grand jury. A witness has no right to object to the subpoena as the fruit of an illegal search or seizure or as having been designed to circumvent the Fourth Amendment's[3] safeguards. The Fourth and the Fifth Amendments no longer even protect a target against compulsion of physical or documentary evidence.[4] The Fifth provides protection only if the witness is aware of the details of his or her rights;[5] even that protection is brief and can be removed by forcing upon the

witness executive-controlled "use" immunity, which does not preclude later prosecution but which does open the door to punishment for silence.[6] Even the Sixth Amendment right to counsel is in jeopardy.[7]

The grand jury has thus become the major loophole in our constitutional scheme for criminal justice. The shift from an accusatorial to an inquisitorial system is felt not only by the grand jury witnesses, targets, and accused, but by all society. When illegally secured evidence can be used before the grand jury, no one is secure in their homes or effects. When a person can be jailed for silence, the presumption of innocence and the standard of reasonable doubt no longer constrain the power of the state to stigmatize and imprison its "enemies."

Applied to the investigation of crime, these inquisitorial powers are oppressive enough; but when directed against political dissidents, they threaten the basic workings of a democratic system.

Abolition or Reform?

The pressing question today is what to do with the monster the grand jury has become. To date, the only real check on grand jury abuse has been the willingness of hundreds to face jail rather than sacrifice basic rights and principles. A weapon so potent as the grand jury has not and cannot be expected to be voluntarily relinquished by the executive or restrained by the Nixon Justices. An act of Congress is required.

The Subcommittee on Immigration, Citizenship and International Law of the House Judiciary Committee, under the chairpersonship of Joshua Eilberg, has been the leading force behind grand jury reform and is considering a variety of proposals ranging from abolition of the accusatorial grand jury to significant reform.

Supporters of abolition come from diametrically different perspectives. Some view the grand jury as having been irreversibly captured by the prosecutor and emphasize the dangers of an apparently democratic institution camouflaging rather than curtailing the excesses of executive power. Others urge the wastefulness of retaining an institution which does no more than rubber stamp the prosecutor's will. Under former Attorney General Levi, the Department of Justice supported a "constitutional amendment that would give the attorney for the government election to proceed either by information or by indictment."[8] The Department wanted this choice in order to be able to use the grand jury for its compulsory investigatory process or as a dress rehearsal for trial.[9]

The arguments for abolition highlight the enormity of the task before the Congress, but they do not compel the view that abolition would be the best or even an acceptable alternative. To amend any portion of the Bill of Rights because repressive forces of government have rendered it ineffectual is a dangerous precedent indeed. Beyond that, history cautions against abolition and illuminates the guiding principles for reconstitutionalizing the grand jury.

Common Law Origins of the Grand Jury[10]

Henry II established the grand jury by the Assize of Clarendon in 1166. Citizens were periodically convened as grand jurors to present to the royal judges those people who the community suspected of crime. Intended by the Norman conquerors to enhance their control over the population, the grand jury quickly demonstrated independence and resistance to arbitrary an oppressive state power:

> Though established to do the king's bidding grand juries functioned, even under Henry, to protect the community. Though subject to penalties, grand jurors had the power not to accuse even those known to be guilty of offenses. Absent a private appeal or accusation of a grand jury, the king was stymied and could not punish the wrongdoer. It was not uncommon in Henry's reign for grand juries to flee to the woods rather than report what the royal inquisition demanded.[11]

As a result of the independent and protective role of the grand jury, presentment by a grand jury became one of the cornerstones of due process guaranteed by the Magna Carta. By the mid-fourteenth century, the grand jury had begun to screen accusations mady by others and to return indictments. Under the reign of the Tudors, crown officials, equipped with subpoena power, generally prepared the accusation. It was then submitted to the grand jury, which might summon witnesses to evaluate the sufficiency of the charges. There were two crucial distinctions between this subpoena power and that exercised today. It was limited by the accusatory function and by the individual's right to refuse with impunity to take the oath:

> The subpoena power compelled a person to appear but could not be used to compel them to testify or give evidence. Justices of the Peace were not supposed to place suspected persons under oath, and they were not supposed to question such persons directly if they did not wish to be questioned. The right against self-incrimination, as a corollary of the right to grand jury indictment, was a well-recognized right of late medieval times. The right against self-incrimination was an absolute right to silence. No person could be forced to take the oath and if the oath was refused no punishment could be imposed.[12]

Although the grand jury lost initiative to the king's officers during this period, it was still a community check on royal power. Claiming insecurity of the dynasty, violence, and lawlessness, the Tudors justified by-passing both grand and petit juries and perfected an inquisitional system through the Star Chamber and the High Commission. Proceedings were initiated "on information," *i.e.*, by informers or the government itself. Witnesses were not charged with any specific offense, but were administered the oath *ex officio:*

> This placed the victim between hammer and anvil. He must swear, tell the truth, and be condemned out of his own mouth, or he must lie and be convicted of the heinous ecclesiastic offense perjury. And for refusal to take the oath he could be punished anyway.[13]

The trilemma posed by these hated inquisitorial bodies is the same as that faced by grand jury witnesses today who are given forced "immunity." The vagueness of the boundaries and purposes of the inquiry are also a common features.

Although the Revolution of 1641 abolished these inquisitorial courts, accusation by information for misdemeanors survived. Informations charging seditious libel provided the prime instrument of oppression against political dissidents in seventeenth and eighteenth century England.

"To the Grand Jury, Defender of American Liberties"[14]

When transplanted to the American colonies, the grand jury "bloomed with all the vigor of a native plant."[15] Indictment was a matter of right for serious offenses, including libel. In the tradition of medieval England, the grand jury reasserted the initiative to make accusations and to hear live witnesses rather than accepting the magistrate's written findings. As in England, refusal to take the oath, which the Fifth Amendment privilege embodies, could not be punished.

The colonists struggled fiercely against attempts by the king's officers to circumvent the grand jury. Describing informations for libel as a child of the Star Chamber, Andrew Hamilton grounded the successful defense of Peter Zenger on the disregard of two grand juries' refusal to indict:

> If Mr. Attorney is at liberty to come into court, and file an information in the King's name, without leave, who is secure, whom he pleases to prosecute as a libeller? . . . And give me leave to say . . . that the mode of prosecuting by information (when a grand jury will not find a billa vera) is a national grievance; and greatly inconsistent with that freedom, which the subjects of England enjoy in most other cases.[16]

The same bypass was attempted in the establishment of the Admiralty Courts because common law juries in America would not convict smugglers. In the famous trial of *Sewall v. Hancock* in which John Adams was defense lawyer, the violation of the fundamental right to grand jury indictment was likewise on trial. That trial was discontinued when a Suffolk grand jury indicted the Governor's unsavory informer for perjury. Later the federal Fugitive Slave Act of 1850 set up special commissioner's courts to vitiate state "liberty laws" which interposed local grand juries to shield fleeing slaves from slaveowners.

Summarizing this history, Professor Scott writes:

> The grand jury was written into the Bill of Rights because it became, in common law England and particularly in the colonies, a leader and symbol of community resistance to arbitrary and oppressive state power. History teaches that in both England and the colonies, despotic rulers were constantly experimenting with more "efficient" and controllable mechanisms to circumvent the grand jury. The most devastating of these were the High Commission and the Star Chamber which claimed also the power to punish a person for refusing to give testimony.
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> [T]he inquisitorial powers claimed by both the Executive and the Supreme Court for the modern grand jury are a perversion of its historical role and function. The power to inquire which inhered in the common law grand jury was connected to its accusatorial or screening function. This is the function mandated by the constitution . . . It is the acquisition of control of the grand jury by the Executive, together with the power to force immunity which has effectively converted the grand jury into a star chamber, which was its very antithesis.[17]

Reconstitutionalizing the Grand Jury

The modern grand jury, usurped by the prosecutor and invested with sweeping inquisitorial powers, thus bears scant resemblance to the people's protector envisaged by the framers. History demonstrates that the task of reform is to:

1. Encourage the grand jury's independence from the prosecutor;
2. Confine the grand jury to its constitutional screening function;
3. Reinvest the process with the safeguards of the Bill of Rights; and most decisively,
4. Eliminate any form of compulsory immunity.

Space doesn't permit comprehensive discussion of the reforms necessary to begin this process; the focus here is on those changes urgently needed to reduce the capability of the grand jury as an intelligence tool against First Amendment protected activities and relationships.

Controlling the Issuance of Subpoenas

The absence of any check on the issuance of subpoenas significantly expands the repressive powers of the law enforcement establishment. FBI agents fill in or alter subpoenas, unbeknownst to the grand jury or even the prosecutor. As we have seen, the grand jury's intelligence-gathering potential is largely accomplished through the agent's threat or "suggestion" of subpoena to balking interviewees. Beyond that, many equate subpoena with an immediate and unchallengeable command to comply and thus the subpoena may afford the agent access which could never pass standards the Fourth Amendment sets for search warrants. Subpoenas are being served with a notice that their command will be deemed satisfied if the information is provided or delivered to the FBI.

To wrest this enormous power from the prosecutor and the agents, subpoenas should not be permitted to issue unless the prosecutor justifies under oath the nexus for the subpoena and the grand jury approves it. The witness should be given notice of the basis for his or her

subpoena and whether he/she is a target, notice of his/her Fifth and Sixth Amendment rights, and two weeks time to prepare to respond. In addition, subpoenas should be invalid if based on an illegal search and seizure or if preceded by official threats to the unwilling in order to encourage them to submit to informal questioning or search.

Judicial Review and Protection of First Amendment Rights

Since the Supreme Court's refusal in *Branzburg v. Hayes*[19] to give weight to First Amendment rights in the grand jury context, witnesses' claims of political abuse have been ignored or subjected to impossible burdens of proof.

Courts consistently bifurcate the grand jury process—and ignore prior FBI interrogations, threats, and illegal searches which have led up to the subpoena itself. Even where a court has characterized the FBI's conduct as "police state tactics," it refused to treat these tactics as relevant for fear of putting "the court in the position of passing judgment on the prudence or imprudence of individual agents' investigative techniques.[20] The intelligence-gathering and harassment purpose of the subpoena will evade review unless judged in the context of the entire investigation.

Because the grand jury is claimed to be pursuing legitimate law enforcement goals, the protection of First Amendment rights requires more sophisticated and probing scrutiny into grand jury procedures than, by comparison, HUAC or COINTELPRO operations. For example, it is not enough to look at whether the questions put to the witness violate associational privacy. It is important to examine whether the witness was singled out for subpoena on the basis, directly or inferentially, of protected First Amendment activity.

> Lureida Torres, a Puerto Rican teacher, spent four months in jail for contempt. The first time she was subpoenaed she was asked about her associations as a university student eight years earlier. The second time the prosecutor asked her to identify persons involved in FALN[21] bombings. Looking only to these laundered questions, the Court disregarded the fact that she was selected for subpoena solely because of her membership in PSP. The FBI's "Domestic Terrorist Digest" links PSP and FALN simply because they both support Puerto Rican independence.[22]

> Edgar Maury also espouses Puerto Rican independence. FBI agents told him that he was selected for questioning before a federal grand jury in Puerto Rico because he had rented a truck during a time period covered by a government investigation, was a supporter of Puerto Rican independence and because his father had been a member of the Nationalist Party in the 1950's. It was the latter considerations which caused the FBI to single him out from the hundreds of other truck renters in Puerto Rico. The government's mere allegation that a crime was under investigation and that the subpoena related to it, foreclosed a hearing on Maury's showing of political harassment.[23]

In such cases the subpoena should be quashed unless the government discloses all its information about the witness and proves that his/her selection was completely independent of First Amendment activity, and that the evidence sought from the witness is both of overriding importance and necessary to effectively pursue the investigation at that time and not otherwise available.

Finally, controversial witnesses are presently helpless to prevent themselves from being convicted as criminal or terrorist in the press. Although government attorneys refused to disclose the subject matter of the VVAW grand jury to the witness' counsel, an article in the *Atlanta Constitution*, based on a Justice Department source, was headlined "BOMB PLOT AGAINST GOP PROBE" and described a massive anti-personnel bombing conspiracy. Needless to say, no evidence of any explosives was produced in the criminal proceedings which followed. Groups are without protection from this kind of maneuver, for civil or criminal remedies against the prosecutor which are brought to bear after the fact cannot preserve fragile First Amendment rights. Subpoenas should be quashed where the government assists in publicizing the grand jury, with the effect of linking First Amendment protected activity with criminal conduct, regardless of whether the information is technically a breach of grand jury secrecy.

And finally, a witness should be entitled to claim an absolute First Amendment privilege so as not to be branded with the stigma of pleading the Fifth Amendment's protection against self-incrimination.

Counsel for the Witness

Without the representation of counsel, rights cannot be preserved nor abuse curtailed in the grand jury process. Given the trend in the Supreme Court[24], Congress must guarantee to the unwary or indigent grand jury witness the same right to counsel enjoyed by the sophisticated and affluent and forbid the present practice of forcing the witness into the jury room alone, without his/her attorney.

However, proposed legislation which appears to guarantee this right restricts counsel to advising the witness and gives the court the power to remove counsel who violates this restriction or in some other undefined way threatens to delay or impede the proceeding.[25]

These are inappropriate and dangerous limitations. The proposed statute also appears to bar the grand jury from hearing from counsel even if it wants to. Such restrictions ignore the potential salutary role that counsel can play in explaining to the grand jurors the witness' position and their powers and duties with respect thereto. The perspective of the witness's counsel is essential to the grand jury's capacity to question the prosecutor, exercise its powers independently to prevent abuse, and respect the rights of both witness and potential accused. Counsel is allowed such participation in Minnesota and a Supreme Court Justice there, interviewed by the American Bar Association, reported no problem.[26] Congress should not calcify what can be left to the independent

judgment of the grand jury and the discretion of the courts.

Moreover, the dangers of authorizing removal and replacement of counsel are obvious. It would invite deprivation of effective counsel of choice and would intimidate counsel from adequately advising the witness and presenting legal challenges. Courts are fully equipped with less drastic powers to deter and punish improper conduct by counsel. These powers are too often abused in cases involving politically controversial defendants or attorneys. Rather than requiring or even authorizing removal of defense counsel, it would be far more appropriate, given recent history, to require sanctions against misbehaving prosecutors.

Independent Legal Advisor to the Grand Jury

The protective function and independence of the grand jury is stymied as long as the prosecutor continues to be both advocate for indictment and legal advisor to the grand jury. So blatant a conflict of interest is not tolerated in any other judicial context, let alone one which so pervasively threatens basic constitutional rights. Not only must the prosecutor be returned to the common law status as litigant before the grand jury, but the grand jury should have available an independent legal advisor to enable it to effectively question the prosecutor's case or purpose in conducting an investigation, to research legal issues, analyze evidence, ferret out exculpatory material, etc. To ensure against overprofessionalization or control by the legal advisor, the position should be a rotating one, perhaps modeled after the system of assigning recent law school graduates as law clerks to federal judges.

Institutionalizing an independent legal advisor for the grand jury does not eliminate the need for appointment of special counsel or prosecutors to assist the grand jury in carrying out independent investigations. History and sound public policy dictate, however, that the power to conduct independent investigations be confined to situations in which official misconduct is at issue.

Encouraging Grand Jury Activism

It is important to take steps toward increasing the independence of the grand jury in the process of obtaining evidence, by requiring that the grand jury be informed by the court or "charged" concerning its accusatory function and powers, and that it vote on the issuance of subpoenas, the necessity for compelling the witnesses' testimony (*e.g.*, approving immunity orders, even if voluntary) and the necessity and appropriateness of charging a witness with recalcitrance.

Proposed legislation would also require a two-thirds majority for the indictment. But given the lower standard for indictments, and the essentially one-sided nature of the evidence the grand jury considers, unanimity should be required. Unanimity should likewise be required when the grand jury votes to cite a witness as recalcitrant, since the grand jury is the only community screen and its citation for refusal to answer is, as a matter of public opinion, tantamount to conviction.

The Baseline Reform: Eliminating Coerced Immunity

The most urgent reforms required to reconstitutionalize the grand jury are both the elimination of any form of coerced immunity and the authorization of voluntary transactional immunity. The efficacy of reforms designed to encourage grand jury independence and meaningful judicial review is, at least in the short run, uncertain. Restoring the absolute right to silence enjoyed under the common law is the only decisive control.

The original understanding of the Fifth Amendment as a "shield of absolute silence" and a protection against involuntary informants is found in some of the early decisions of the Supreme Court Justices. Dissenting in *Brown v. Walker*,[27] which upheld a narrow form of transactional immunity, Justice Field wrote:

> [B]oth the safeguard of the Constitution and the common law rule spring alike from the sentiment of personal respect, liberty, independence, and dignity which has inhabited the breasts of English-speaking peoples for centuries, and to save which they have always been ready to sacrifice many governmental facilities and conveniences. In scarcely anything has that sentiment been more manifest than in the abhorrence felt at the legal compulsion upon witnesses to make concessions which must cover the witness with lasting shame, and leave him degraded both in his own eyes and those of others.

Indulging the fiction that immunity substitutes for, but does not divest, the Fifth Amendment, a series of decisions since *Brown* have chipped away at its guarantee of silence; the Burger Court has recently obliterated it.[28]

Coerced immunity in the grand jury process is, in fact, a very recent phenomenon, begun on a limited scale in 1954 to get the "Fifth Amendment communists." Limitless "use" immunity, unrestrained by judicial review or the inability to prosecute the witness for the crime under investigation, came into being in 1970. But the evil of coerced immunity exists whether it be "use" or "transactional,"[29] for it allows

the government to punish silence.

The despotic potential of such power counsels against its use under any circumstances. Though the Department of Justice strenuously asserts the necessity of forced immunity, it has failed to record or demonstrate how it has been used, in what contexts it produced testimony which would not otherwise be obtainable through a voluntary exchange of transactional immunity or other investigative means, and whether the testimony covered was useful, let alone essential, to conviction.

It is clear, for example, that where subpoenas invade First Amendment protected rights and relationships of intimacy and trust, coerced immunity has served only illegal purposes of intelligence-gathering, stigmatization and incarceration. Even in organized crime investigations, its usefulness is hotly disputed, and one wonders whether their forced immunity produces either cooperative or reliable informants. Nonetheless, it is predicted Congress will blindly follow the Justice Department's exhortations and, at best, restore forced transactional immunity and require judicial review. At the very least, Congress should order a thorough inquiry by the General Accounting Office before assuming that there is even marginal efficacy found in using coercive immunity in any context.

Finally, given the stigma that attaches to "taking the Fifth," particularly in the political context, the government should have to assure the witness immunity before he/she is required formally to lodge the plea.

"Recalcitrant" Witnesses

A ceiling on the period of punishment for contempt, whether civil or criminal, is crucial to mitigating the power of the grand jury, particularly if coercive immunity remains available. The American Bar Association has supported a non-reiterative six-month limit on "coercive" incarceration. The conduct of recalcitrant witnesses in recent years, however, suggests the contemnor testifies before or very shortly after incarceration and that six months is unwarranted and punitive, rather than "coercive."

Conclusion: Urgent Need for Reform

Maria Cueto, former director of the Episcopal Church's National Commission on Hispanic Affairs, and Raisa Nemikin, a secretary there, are in jail until July 1978 for refusal to testify in response to subpoenas which attempt to link the Hispanic Commission with the FALN and discredit activist social ministries sponsored by progressive church groups. Radical sports figure Phil Shinnick and sportswriter Jay Weiner were jailed for their refusal to cooperate with a Scranton, Pennsylvania grand jury purporting to investigate the harboring of Patricia Hearst. Shinnick was released by the Justice Department shortly after Tom Wicker devoted a column in the *New York Times* to his case; Weiner, being lesser known, was held three months longer, until released by the judge. Jill Raymond, the first victim of the post-Nixon wave of grand jury abuse, spent 14 months in Kentucky county jails and was spared resubpoena to a non-existent investigation in 1976 as a result of intense public pressure. By contrast, subpoenas against three filmmakers, editing a film on the Weather Underground, were dropped without a court battle because of immediate, widespread protest in the Hollywood community, which remembered the havoc of the 1950's.

Congressional reform is urgently needed. But if enactment of voluntary immunity, which is absolutely critical to curbing grand jury abuse, is in doubt, reform will only mitigate the impact of abuse, but not decisively curb it. Meanwhile, as we have seen, the political intelligence program of the grand jury under post-Nixon administrations, is increasingly carried out under a carefully tailored cloak of criminal investigations. All this suggests that recalcitrant witnesses and interviewees will continue to be a major constraint on grand jury illegality and that their success, as well as the efficacy of any reforms, hinges ultimately on the public's ability to reject the legitimacy myth that surrounds the grand jury.

FOOTNOTES

*Rhonda Copelon is a staff attorney with the Center for Constitutional Rights, which has been counsel to numerous witnesses challenging grand jury abuse. This article, a sequel to Judy Mead's "The Grand Juries: An American Inquisition," (*First Principles*, September, 1976) draws on testimony of a panel of experts invited to testify on March 17, 1977 in hearings on federal grand jury reform before the Subcommittee on Immigration, Naturalization and Citizenship of the House Judiciary Committee. The panel consisted of Doris Peterson, attorney with the Center for Constitutional Rights, 853 Broadway, NY, NY 10003; Robert L. Borosage, Director of the Center for National Security Studies, 122 Maryland Ave. NE, Washington, DC 20002; Linda Backiel, attorney with the Grand Jury Project, CCR, 853 Broadway, NY, NY 10003; and Dr. J. Anthony Scott, Professor of Anglo-American Law, Rutgers University Law School, Newark, N.J. Copies of the complete testimony are available on request from the individual panelists.

1. In COINTELPRO, the snitch jacket was misinformation planted to create the suspicion that a colleague was a Bureau informer

2. In the selection of a trial jury, *voir dire* is the process of questioning prospective jurors to determine if they are biased.

3. *United States v. Calandra*, 414 U.S. 338 (1974).

4. *United States v. Mara*, 410 U.S. 19 (1973); *United States v. Dionisio*, 410 U.S. 1 (1974). See also *Fisher v. United States*, ___U.S.___, 96 S. Ct. 1569 (1976).

5. *United States v. Mandujano*, ___U.S.___, 96 S. Ct. 1768 (1976).

6. *Kastigar v. United States*, 406 U.S. 441 (1972).

7. *United States v. Mandujano, supra.* See also *Weatherford v. Bursey*, ___U.S.___, 45 U.S.L.W. 4154 (Feb. 22, 1977).

8. Letter of W. Vincent Rakestraw, Assistant Attorney General, Department of Justice, to Hon. Peter W. Rodino, Jr., Chairman House Judiciary Committee, *Hearings*, pp. 74, 75.

9. *Ibid*, p. 74.

10. The following history is drawn from the "Testimony of John Anthony Scott, Legal Historian and Lecturer in Law, Rutgers University School of Law, Newark, New Jersey, before the House Judiciary Committee, Subcommittee on Immigration, Citizenship and International Law, March 16, 1977." Page references are to the typewritten testimony which will be printed by the subcommittee at the conclusion of its hearings.

11. *Scott*, p. 7.

12. *Scott*, p. 12.

13. *Scott*, p. 14.

14. *Scott*, p. 31. This was a toast frequently given by patriots in colonial America.

15. *Scott*, p. 30.

16. Rutherford, Livingston (ed.) *John Peter Zenger: His Press, His Trial* (New York, 1904) pp. 118-119, cited in *Scott*, p. 30.

17. *Scott*, pp. iii

18. Detailed analysis of the proposed reforms is available in the Testimony of the Center for Constitutional Rights, which will also be printed by the subcommittee at the conclusion of the hearings.

19. 408 U.S. 665 (1972).

20. *In re Scott*, No. 4641 (M.D. Pa. 1975).

21. Translated from Spanish, the initials "FALN" stand for "National Liberation Armed Forces."

22. *In re Torres*, No. 76 Misc. 11-188, (S.D.N.Y., 1976)

23. *In re Maury*, 533 F.2d 727 (1st Cir. 1976).

24. *United States v. Mandajano, supra.*

25. H.R. 94, §330A provides:

(c) Such counsel shall be allowed to be present in the grand jury room only during the questioning of the witness and shall be allowed to advise the witness. Such counsel shall not be permitted to address the grand jurors or otherwise take part in proceedings before the grand jury.

(d) The court shall have the power to remove such attorneys and order the witness to obtain new counsel, when it finds that the attorney has violated subsection (c) of this section *or* that such removal and replacement is necessary to insure that the activities of a grand jury are not unduly delayed or impeded.

26. Testimony of Richard E. Gerstein before the Subcommittee on Immigration, Citizenship and International Law. Report of Proceedings, Hearing on H.R. 94, March 17, 1977, p. 89.

27. 161 U.S. 591 (1896).

28. See *e.g., Kastigar v. U.S., supra; U.S. v. Dionisio, supra; U.S. v. Mara, supra;* and *Fisher v. U.S., supra.*

29. "Use" immunity applies only to evidence in the testimony of the witness him/herself; the witness may still be prosecuted for the alleged crime under investigation. "Transactional" immunity, by contrast, guarantees that a witness cannot be prosecuted for anything related to the transactions about which s/he has testified.

Grand Jury Reform Bills

Under consideration before the 95th Congress

	H.R. 3736 Conyers	H.R. 94 Eilberg	H.R. 2620 Patterson	H.R. 844 Drinan	H.R. 406 Holtzman
Witness consent required for grant of immunity	X		X	X	
Transactional rather than use immunity required	X	X	X	X	
Strict guidelines for forced immunity established		X			
Counsel permitted to accompany witness before grand jury	X	X	X		
Subpoena must contain notice of rights, subject matter and statutes involved, etc.	X	X	X		
Contempt confinement limited to six months, not to be repeated for refusal to testify on same matters, and guidelines established for place of contempt confinement	X	X	X		X

The Carter Devolution on the CIA: A Chronology

BY JERRY J. BERMAN

On February 14, 1977, President Carter learned that the *Washington Post* planned to reveal a secret CIA operation involving the payment of millions of dollars to King Hussein of Jordan. Last summer, CIA officials who viewed the payments as "bribes" reported the program to the Intelligence Oversight Board established by President Ford to review the legality and propriety of CIA operations. The Board determined that the payments, amounting to $750,000 in 1976, were "impropef," (or improperly withheld from President Ford, it is not clear which*) and reported the matter to President Ford. The President took no action.

Apparently this was the first President Carter had heard of the twenty-year secret program. According to informed sources, the President was "distressed." His response to the revelation offers the first concrete indication—outside of the aborted Sorensen nomination—of the new Administration's views on matters of secrecy, "leaks," and the use of the CIA as an instrument of secret foreign policy.

Campaign Positions

During his presidential campaign, candidate Jimmy Carter spoke often about the "shocking revelations" concerning the CIA and the need for concrete reforms. Here is some of what candidates Carter and Mondale said:

On Secrecy: If elected, Carter promised to curtail "excessive secrecy" in government. His running mate, Walter Mondale, underscored the point. "Abuse thrives on secrecy," he said. "Knowledge is the key to control." In a campaign position paper, "Jimmy Carter on the CIA," Carter warned that:

> *We must never again keep secret the evolution of our foreign policy from the Congress and the American people. They should never again be misled about our options, commitments, our progress or our failures.*

In his Inaugural Address, he said:

> *We will not behave in foreign places so as to violate our rules and standards here at home, for we know that this trust which our nation earns is essential to our strength.*

On Candor: If these standards were violated or the laws broken, Jimmy Carter promised to bring the matter before the American public:

> *If the CIA ever makes a mistake, I'll be the one, as President, to call a press conference, and I'll tell you and the American people, this is what happened, these are the people who violated the law, this is the punishment I recommend, this is the corrective action that needs to be taken, and I promise you it won't happen again.*

On Accountability: Carter promised that he would accept "personal responsibility" for CIA operations to insure that the agency "obeyed the law." His running mate stated that the Administration would:

> *press for a specific legislative charter to spell out the powers of the FBI, CIA and other intelligence agencies, and the precise limitations on those powers.*

*See Osborne, John, "White House Watch: Carter's Oversight," *The New Republic*, March 19, 1977.

The Administration's Positions

But here, by comparison, is how Jimmy Carter, the President, has dealt with the revelation of the secret payments to King Hussein.

February 16: Carter summons *Washington Post* Executive Editor Ben Bradlee and reporter Bob Woodward to the White House. While not stating that the revelation of the Hussein payments would affect "national security," Carter makes it clear that he is "distressed" about the impact of the story on on-going Middle East negotiations and that he prefers that the story be delayed or not published. He also indicates that the payments have been stopped. The President wants to be notified prior to publication. Several hours after the meeting, the *Post* informs the President that the story will appear on Friday.

February 18: The *Post* prints the story. White House Press Secretary Jody Powell states that it is Administration policy not to confirm or deny the story but that an intensive review is underway.

> *It is the Administration's policy not to comment on—either to confirm or deny—any stories concerning alleged covert activities. By definition any comment would be a contradiction in terms since the operation in question would no longer be covert or secret.*
>
> *You should know, however, that almost from the first day of the Administration, senior officials . . . have been engaged through the National Security Council in an intensive and comprehensive review of all sensitive foreign intelligence activities.*
>
> *This review is nearly completed, and, on the basis of its findings, the President will make basic decisions concerning the future of such activities, the purpose of which is to protect the security of our country and its people. The objective of the review is to make certain that activities are proper, to insure full compliance with oversight procedures by law, and that what can be done openly is not done secretly.*

The Press Secretary sees no inconsistency between this policy and the Administration's promise to reveal "mistakes" to the public. Privately Administration sources indicate that the payments have been stopped.

February 22: President Carter meets with congressional leaders over the Hussein matter. Reportedly, he tells them that the action by the *Washington Post* was "irresponsible." He voices grave concern over the number of persons in the Administration and in Congress with access to intelligence secrets. He reveals that he has cut the number of White House officials with access from 40 to 5 and requests the leadership to work with him to cut down the number of congressional committees with access to sensitive information from 7 to 1. Senator Daniel Inouye, Chairman of the Senate Intelligence Committee, tries to assuage the President's fear of "leaks" by indicating that members of his Committee are being monitored by the FBI.

On this same day, Admiral Stansfield Turner, Carter's designate for Director of the Central Intelligence Agency, testifies at his confirmation hearing. While assuring the Senate Intelligence Committee that the CIA would conduct operations within the law and in conformity with American values, Turner stresses the need for a tighter reign on security. "Covert operations must be handled discreetly," he warns. "People's lives are at stake." He states that he favors one committee in each house to have access to intelligence secrets. Turning to the issue of reform, he indicates that President Carter is satisfied that no new laws are necessary to govern the CIA. "The President," says Turner,

> *wants to be ensured that the Foreign intelligence work of all agencies of the Government is being conducted strictly in accordance with law and American values. The President indicated that while he believes that these objectives* are encompassed by existing law and executive directives, *he intends to work closely with the Congress on any revisions to law and to executive orders as may be desirable to assist the Director of Central Intelligence [sic] fulfilling those charges.*

Senator Inouye asks if an official secrets act may be one law that is necessary. Pointing out that even though officials take an oath not to divulge secrets,

> *we know that in violation of this oath, articles have been written, books have been written, names have been printed, operations have been described. Do you believe that criminal sanctions should be provided for by law to punish those who violate this oath?*

Turner's response is "Yes." The Director-designate is invited by the Committee to draft such a law for consideration by the Congress. Carter and Mondale later express reservations about "criminal" penalties to protect against leaks and state they prefer civil remedies instead.

February 23: President Carter calls a press conference and responds to questions about the Hussein payments. He reiterates that "I have adopted a policy, which I am not going to leave, of not commenting directly on any specific CIA activity . . ." However, he has "reviewed the more controversial revelations that have been publicized in the last few days, some quite erroneous, some with some degree of accuracy. . . . I have found nothing illegal or improper." In emphasizing the dangers of disclosure, he characterizes the operations in this way:

> *It can be extremely damaging to our relationship with other nations, to the potential security of our country even in peacetime, for these kinds of operations which are legitimate and proper to be revealed.*

He again expresses concern "about the number of people now who have access to this kind of information" and reports that he has been working with the congressional leaders "to try and reduce the overall number of people who have access to the sources of information."

February 24: Appearing at the State Department, Carter returns to the subject of access to secret information:

> *I was shocked when I took office to learn about the number of different people who had access to highly secret, sensitive information on which the security of*

the nation depends. There are 75 people on Capitol Hill who have access to this very sensitive material.

Now the President favors the creation of a joint committee in the Congress.

I have hopes . . . that we can have one joint congressional committee with a limited membership to whom we can reveal what is going on in its entirety. . . . So, we will have a key group in Congress—very small—myself, the Intelligence Oversight Board, . . . the Attorney General, and let that be it. . . . We are now in the position where some of our key intelligence sources are becoming reluctant to continue their relationship with us because of the danger of their being exposed in the future.

Asked to comment on the Freedom of Information Act, Carter says that while he favors such laws, he admits that the volume of requests by citizens for information is "a problem" and "a burden." He hopes that citizens can be persuaded to keep their requests to a minimum; that supporters of the legislation will not bring frivolous test cases just to see that the act works; and that fewer requests will be made if people trust the government again.

February 27: Secretary of State Cyrus Vance appears on Face the Nation and defends the secret payments as "appropriate."

The purposes are common purposes. The actions taken are in the interests of the country involved as well as the United States. In these cases that have been referred to the best of my knowledge, there was nothing improper or illegal, as the President has pointed out. These kinds of things can not be done in the glare of public publicity and therefore my answer to your question is yes, I do believe it appropriate.

In an interview in the *Washington Star*, Vice-President Walter Mondale defends Carter's policy of not commenting on specific CIA stories and his call for a reduction in the number of congressional committees with access to secret intelligence. His answer to two questions are worth reporting:

Q: Wouldn't you scream bloody murder if, as a senator, you were denied access to that material?
A: If I weren't on the appropriate committee, I might have . . .
Q: The President seems to think that he can say that he knows what's going on and that Brezezinski knows what's going on, that Inouye knows what is going on—that is enough to satisfy the public. Do you think that's true?
A: I believe it is and I believe it is essential if the public feels different to make that case. ■

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In The News

ARMY/GERM WARFARE. Army Secretary Clifford Alexander released a 2-volume report on 239 "open air" biological warfare experiments from 1949-1969. Tests included mock attack in New York City's subways. The report lists suspicions of resulting illnesses and deaths among laboratory workers. In addition, Senator Kennedy released a summary of a separate CIA report showing that OSS (Office of Strategic Services) had used germ warfare against Nazi Germany. (*New York Times*, 3/9/77, p. 1; *Washington Post*, 3/9/77, p. 1)

CARTER ADMINISTRATION/CIVIL PENALTIES FOR LEAKS. Both Carter and Mondale have announced they are against criminal penalties for those who leak classified information. Carter's statement that he hoped disclosures could be prevented "rather than trying to control that problem by the imposition of legal or criminal penalties" conflicts with the position of his new CIA Director, Adm. Stansfield Turner, (*New York Times*, 3/10/77, p. 12)

CHILEAN JUNTA/U.S. DRUG ENFORCEMENT AGENCY. Apparently at the behest of the U.S. DEA, Jorge Dabed-Sumar, a wealthy Chilean businessman, was arrested and tortured by Chilean police in Oct. 1973 on charges of selling drugs. After being acquitted by Chilean courts he was apparently kidnapped by the Drug Enforcement Agency, which lacked a legal basis for extradition. Convicted in a U.S. court for conspiracy to import cocaine, Dabed was released from jail after nearly 2 years and charged with being an illegal alien. (*Chicago Daily News*, 3/12/77, p. 3)

CIA/AGEE. The Justice Dept. has told Philip Agee, author of *CIA Diary*, that he will not be prosecuted for espionage if he returns to the U.S. CIA's reaction to the Justice Department's decision was one of dismay: "It [the decision] reinforces our argument that we don't have laws to prevent people from disclosing classified information." "However," the Justice Dept. wrote to an Agee attorney, if additional information came to light a further investigation of Mr. Agee would be undertaken "to determine whether or not prosecution should ensue." (*New York Times*, 3/21/77, p. 7; Civiletti letter to Melvin Wulf, 3/18/77, on file at CNSS)

CIA/CHILE. At the UN Human Rights Commission in Geneva, U.S. representative Brady Tyson expressed "profoundest regrets for the role . . . played in the subversion of the previous democratically elected Chilean Government." The remark was immediately repudiated by the Carter administration, which called the remarks unauthorized, and recalled Tyson back to Washington for consultation. (*New York Times*, 3/9/77, p. 1, *New York Times* 3/10/77, p. 13)

CIA/CORPORATE PAY OFFS. According to government sources, the CIA knew about and probably encouraged the under-the table cash payments from American corporations to political leaders overseas, such as Lockheed's $7 million payments to Yoshio Kodama of Japan as its military aircraft agent. Kodama also had covert associations with the CIA. (*Wall Street Journal*, 3/1/77, p. 2)

CIA/FOIA. Effective as of March 1, 1977, the CIA has agreed to maintain an index of its disposition of requests for waiving of fees for release of documents which, it is asserted, would benefit the general public. (Savige letter of Mar. 3, 1977)

CIA/NEW DEPUTY. The CIA announced that Professor Robert Bowie of Harvard University has been named the Agency's Deputy for National Intelligence, where he will be responsible for CIA intelligence estimates. (*New York Times*, 3/31/77, p. A1)

CIA/PAYMENTS TO FOREIGN LEADERS. Although many foreign leaders who were named last month as recipients of secret CIA funds have issued denials, sources within the government confirm the majority of the allegations. Sec. of State Vance explained that the payments could not be compared to Korean bribes of U.S. Congresspersons because they had been "government to government" assistance, not meant to line the pockets of friendly foreign leaders. (*New York Times*, 3/1/77, p. 8)

CIA/UNIVERSITIES. The discovery that Dr. Myron Rush, Cornell professor of Soviet Studies, is presently scholar in residence at CIA headquarters has led to charges by students there that faculty involvement with the CIA "undermines the trust necessary for the survival of the academic community and basic academic freedoms." The protest against Rush comes at a time when colleges and universities across the country are re-evaluating their ties to the intelligence community in light of the Church Committee's report of widespread Agency links to the academic community. (*New York Times*, 3/20/77)

CONGRESSIONAL INVESTIGATION/KISSINGER BLACKMAIL? 11 members of the former House Intelligence Committee have requested the Justice Dept. look into allegations made by columnist William Safire that former Sec. of State Kissinger may have tried to deter the Committee from probing deeply into matters embarrassing to both Kissinger and former CIA director Richard Helms. According to Safire, Kissinger learned of the Korean payments to members of Congress by 1974, and used the threat of disclosure to dampen certain investigations. (*New York Times*, 3/18/77, p. 11)

FBI/INFORMERS. According to censored documents provided to Rep. Patricia Schroeder (D. Colo.) by the FBI, Timothy Redfearn, an FBI informer, reported on a 1972 party at the Denver home of the Congresswoman. (*Washington, Post*, 3/12/77, p. A5)

FBI/OPPENHEIMER SURVEILLANCE. Documents released under FOIA to the *Chicago Sun-Times* describe the physical and electronic surveillance by the FBI of J. Robert Oppenheimer, "father of the atomic bomb." The Bureau spied on Oppenheimer from 1941 through at least 1954 and at one time had 3 cars cruising the roads around Princeton, NJ to tail the scientist when he left home. (*Chicago Sun-Times*, 3/13/77, p. 3)

FBI/PROSECUTION OF AGENTS FOR BURGLARIES. According to sources in the Justice Department, the Civil Rights Division has recommended that Attorney General Bell seek indictments of low-level

In The News (con't.)

personnel involved in illegal burglaries as a stepping-stone to possible further prosecution of about 6 present and former FBI executives. (*Washington Post*, 3/31/77, A1)

FBI/SWP BURGLARIES. Timothy Redfearn, an FBI informer serving 10 years in a Colorado state prison for burglarizing SWP offices in Denver, has told the Justice Department that the FBI paid him $4,100 in exchange for his refusal to testify before a Denver County grand jury investigating the case. According to the FBI, the 2 agents named by Redfearn deny the charges. (*Washington Post*, 2/28/77, p. C4)

HOUSE ASSASSINATION COMMITTEE. Following the recent resignations of Chairman Henry Gonzalez and Chief Counsel Richard Sprague, the House has voted to continue the investigation into the murders of Pres. Kennedy and Rev. Martin Luther King, Jr. Gonzalez has been replaced by Louis Stokes (D-Ohio). (*Washington Post*, 3/31/77, p. A1)

HUMAN RIGHTS IN USSR/CIA CONNECTIONS? The Soviet government newspaper *Izvestia* accused American diplomats in Moscow of being CIA agents who were recruiting Soviet dissidents for espionage purposes. Among those dissidents accused of giving information to the CIA were members of an unofficial group monitoring Soviet violations of human rights according to the 1975 Helsinki agreements. (*New York Times*, 3/5/77, p. 3)

GRAND JURIES. Two women employed by the National Commission on Hispanic Affairs of the Episcopal Church in New York went to jail rather than testify before a grand jury investigating a series of FALN bombings in New York. They allege that the grand jury probe is intended to undermine the church's support of Puerto Rican independence. See p. 7 of this issue of FIRST PRINCIPLES. (*Washington Post*, 3/22/77, p. A3)

JUSTICE DEPARTMENT/DEFENSE OF GOVERNMENT OFFICIALS. At least 60 present and former government officials are being sued in civil courts for spying on Americans. To avoid a conflict of interest, the Justice Dept. has already paid nearly $800,000 to private attorneys defending some 45 officials and has requested $4.8 million from Congress to hire private attorneys to continue their defense. (*New York Times*, 3/27/77, p. E5)

KENNEDY ASSASSINATION. Santos Trafficante, underworld leader purportedly named as enlisted by the CIA to kill Fidel Castro, was called before the House Committee on Assassinations, but pleaded the Fifth Amendment to all questions, including whether he had advance information on the Kennedy assassination and whether he was visited by Jack Ruby while still in prison in Cuba. (*New York Times*, 3/17/77, p. 23)

KING ASSASSINATION BOOK. In response to an inquiry concerning possible CIA activity involving Mark Lane's forthcoming book on the assassination of Martin Luther King, Jr., entitled *Code Name Zorro*, the CIA General Counsel stated in a Mar. 29, 1977 letter to Lane's ACLU attorneys that the Agency does not intend to interfere with the book's publication, promotion, or distribution. FBI Director Kelley made a similar statement in a letter of Mar. 30, 1977.

LOCAL RED SQUADS. The terrorist activities by the Hanafi Muslims in Washington have given the Metropolitan Police Dept.'s advocates of surveillance their newest excuse to continue such spying. They maintain that limiting surveillance to investigating crimes is not a sufficient standard on which to base their activities. (*Washington Post*, 3/11/77, p. A15)

LOCAL RED SQUADS. Mar. 5. The Mississippi State Sovereignty Commission, which has been running COINTELPRO-type operations in Mississippi since 1956, and has boasted that between 1964 and 1967 alone it accumulated files containing the names of 10,000 individuals and about 270 organizations was abolished by the state legislature. (*Washington Post*, 3/6/77, p. A2)

SECRECY/ADMINISTRATION POLICY. Vice President Mondale, disagreeing with CIA Director Turner, says he would support some form of civil remedies for disclosure of "national security secrets", but is personally opposed to criminal penalties for such disclosure. (*Washington Post*, 3/5/77, p. A1)

SURVEILLANCE/OFFICIAL ATTITUDE. General George Brown, Chairman of the Joint Chiefs of Staff is quoted as recently saying that "If any citizen of this country is so concerned about his mail being read or is concerned about his presence in a meeting being noted, I'd say we ought to read his mail and we ought to know what the hell he has done." (*Washington Post*, 3/27/77, p. A2)

In The Courts

DAMAGE ACTION. *Founding Church of Scientology v. Kelley*, No. 77-0175 (D.D.C., Jan. 31, 1977, Gesell, J.). The Church of Scientology has joined the list of organizations filing for damages and injunctive relief against the federal intelligence agencies.

FOIA/CIA. *Baker v. CIA*, 425 F. Supp. 633 (D.D.C. 1977). In a case involving a request by a former CIA employee for CIA personnel records, the court held that 50 U.S.C. §403g applied and granted the government's motion for summary judgment.

FOIA/CIA. *Ray v. Bush*, No. 76-0903 (D.D.C., Jan. 25, 1977). Relying on *Weissman v. CIA*, No. 76-1566 (D.C. Cir., Jan. 6, 1977), the District Court granted a government motion for summary judgment for documents withheld from a personal file.

FOIA/CLASSIFIED INFORMATION. *Weissman v. CIA*, No. 76-1566 (D.C. Cir. Apr. 4, 1977). The Court of Appeals for the District of Columbia Circuit has amended the opinion in *Weissman v. CIA*, No. 75-1583 (D.D.C. Jan. 6, 1976), which now makes clear that claims of exemption under (b)(1), like all other FOIA exemptions, are subject to *de novo* review in the district court. The court also revised its comment on situations in which *in camera* review is appropriate and stated that

In The Courts
(Continued)

such review should be undertaken where the record is vague *or* where the agency claims are too sweeping or suggest bad faith.

PRIOR RESTRAINT. *In re Halkin*, No. 77-1313, Mar. 31, 1977. On behalf of the attorneys and plaintiffs in *Halkins v. Helms*, No. 75-1773 (D.D.C., Feb. 14, 1977), a *suit relating to the CIA CHAOS* Project, the ACLU filed a petition for mandamus asking the Court of Appeals to vacate a prior restraint order on release and comment on CIA documents provided to the plaintiffs.

RED SQUADS/INFILTRATION OF LEGAL TEAM. *Alliance to End Repression V. Rochford*, No. 76-2293 (7th Cir. Mar. 1, 1977), appealing No. 74 C 3268, (N.D. Ill.) Order of Nov. 10, 1976). A three-judge panel upheld the order of Judge Alfred Y. Kirkland which enjoined the defendants from infiltrating the Alliance's legal team to gather information and from using any information so gathered. The fact that the defendants asserted that there were "no present plans to initiate any surveillance" did not make the injunction an abuse of discretion.

SURVEILLANCE AND FOIA SUITS. *National Lawyers Guild v. Attorney General*, No. 77 Civ 999 (S.D.N.Y. March 1, 1977) (Complaint). The National Lawyers Guild filed a class action suit against the federal intelligence agencies which 1) alleges surveillance and harassment and seeks declaratory and injunctive relief, and 2) seeks access under the Freedom of Information Act to files on the Guild.

CASES REPORTED

Halperin v. Kissinger, No. 1187-73 (Dec. 16, 1976) is reported at 424 F. Supp. 838, (D.D.C. 1976). *Open America v. Watergate Special Prosecution Force*, No. 76-1371 (July 7, 1976) is reported at 547 F. 2d 605 (D.C. Cir. 1976). *Phillippi v. CIA*, No. 76-1004 (Nov. 16, 1976) is reported at 546 F. 2d 1009 (D.C. Cir. 1976).

In The Literature

Books

The Night Watch: 25 Years Of Peculiar Service, by David Atlee Phillips (Antheneum, 1977). Director of the CIA Western Hemisphere Division during the time of Allende's overthrow in Chile in 1973, Phillips gives a mostly positive account of "the Company," but the omnipresence of CIA operations emerges as an unintended theme for skeptics to ponder.

Articles

"Carter's Oversight," by John Osborne, *The New Republic*, Mar. 19, 1977, p. 8. Discusses the functioning of the Intelligence Oversight Board (the IOB, set up by Ford to watchdog the intelligence agencies—see FIRST PRINCIPLES, Mar. 1976) in light of CIA payments to Hussein and other leaders and, specifically, what degree of access Congress should have to the IOB's reports on such activities.

"The Grand Juries: An American *Inquisition,"* by Judy Mead, Center for National Security Studies Reprint No. 105. A reprint of a chapter appearing in *The Lawless State* (Penguin, 1976) which covers *the way that grand jury powers* have been turned into a judicially sanctioned intelligence agency. Available for 50¢ from CNSS, 122 Maryland Ave., NE, Washington, DC 20002.

"How Can He Never Lie To Us, If 'Dirty Tricks' Boys Go On the Loose?" by John Marks, *The Washington Star*, February 20, 1977. John Marks of CNSS outlines steps that the new CIA director should take to insure that CIA activities are lawful.

"The Incident," by Taylor Branch and John Rothchild, *Esquire*, Mar. 1977, p. 55. Account of 2 American journalists in Venezuela trying to sort out the ongoing interrelationships of CIA, FBI, State, Cuban terrorists, and the Venezuelan secret service.

"Lame Duck Chief Kelley Is Reforming Tomorrow's FBI," by John M. Goshko, *Washington Post*, 3/27/77, p. A3. According to Goshko, Clarence Kelley has been reforming the FBI in ways that have largely escaped public notice. Goshko drew this conclusion in spite of the fact that no one had yet been indicted or prosecuted for burglaries, wiretaps, bugs, and COINTELPRO operations, that Kelley did not know that burglaries were continuing, and that he did not replace high-ranking officials from Hoover's regime until forced to.

"Sam Jaffe and The New Blacklist," by Taylor Branch, *Esquire*, March 1977, p. 36. Denounced variously as a CIA/FBI informer and a KGB agent, one-time CBS correspondant and ABC bureau chief Sam Jaffe has been trying to track down sources that pinned the labels on him.

"Secrecy As Usual?" by Anthony Lewis, *New York Times*, Mar. 17, 1977. The Carter Justice Department is currently contesting more than 600 lawsuits under Freedom of Information Act; after describing some examples, Lewis concludes that the Carter administration "could take a significant step toward open government by seeing to it that pointless resistance to public information" be ended as a matter of policy.

The Southern Connection: Recommendations For A New Approach To Inter-American Relations, Institute For Policy Studies, Feb. 28, 1977, 25 pp. The report recommends changes in U.S. policy in Latin America, including a gradual phase-out of U.S. foreign military operations, a mandatory policy on human rights, and acceptance of socialist governments. Copies available from IPS, 1901 Q Street N.W., Washington, D.C. 20009.

Law Review Articles

"The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers," by Geoffrey R. Stone, *American Bar Foundation Research Journal* 1197 (1976).

"Senate Bill No. 1 and the Freedom of Information Act: Do They Conflict?" by J. C. Goodale, 28 Admin. L. Rev. 347 (Summer 1976).

Government Publications

Official Accountability Act, Hearing Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 94th Cong., 2nd Sess., on H.R. 8388. Testimony of Robert Borosage, Center for National Security Studies; Marcus Raskin, Institute for Policy Studies; and others on a bill which would effectively limit the abuses of executive discretion in international affairs by enforcing international laws and standards.

"Disorders and Terrorism: Report of the Task Force on Disorders and Terrorism," by the National Advisory Committee on Criminal Justice Standards and Goals, 611 pp., Mar. 2, 1977. Among other things, the report proposed that the FBI not be required to prove that persons are disposed to violence before they can be placed under surveillance. Available from Department of Justice, LEAA, Washington, D.C. 20531. GPO #052-003-00224-8.

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it was published, refused to discuss what actually happened, and then wrote letters to some of those accused foreign leaders—which in some cases may violate his pledge to always tell the truth to the American people. The President then went to the State Department and said that people should stop using the FOIA out of "idle curiosity." Once people see that we can be trusted, he says, they will stop demanding so much information. And then he said that the key to preventing leaks is not to reduce the amount kept secret but to narrow the circle of those who know.

The Justice Department has continued to defend secrecy and surveillance in litigation brought by the Project on National Security and Civil Liberties. The "new" Justice Department sought and obtained an injunction which prevents us from releasing or discussing a set of documents from our lawsuit against the CHAOS program which show that illegal activities were contemplated as part of the program. In other cases efforts are made as usual to invoke the state secrets privilege in order to prevent litigation of constitutional claims and release of documents.

It is clear that there is not yet a center of gravity on this set of issues. The great danger is that there never will be. It is easy, as all of the senior and most of the junior people are discovering, to get caught up in the crisis of the day. Usually, one turns to intelligence issues only in a time of crisis, when the temptation is to cut losses, to minimize the harm.

Jimmy Carter talked of intelligence agency abuses during the campaign, but it has not found its way onto the agenda of issues currently under intense review for proposing comprehensive legislation. Welfare reform, energy policy, inflation, even human rights are on this agenda, but intelligence agency abuse is not. Nor is it easy to say why. Some attribute part of the problem to Zbig Brzezinski, the White House National Security Advisor who is said to be the source of the statements on the need for more secrecy and no legislation. Part of the problem is that the new Attorney General, whatever his views (and there is no reason to think that they are unsympathetic), simply has different issues—such as court reform and sentencing—higher on his own agenda than intelligence abuses.

And in contrast to many other areas of government, the bureaucracy has a complete lack of interest in comprehensive legislation or investigation of the past. By contrast, in HEW there are many who are ready to design welfare reform, and everywhere inside the bureaucracy there are advocates of a new energy policy. Not so for the intelligence business.

There will have to be some major new initiative if Carter is to live up to his campaign promises in this area. What is needed is strong leadership from the top to set in motion the mechanism to produce comprehensive legislation to bring the intelligence agencies under the Constitution. The logical man to lead such an effort is the Vice President. As Senator, Mondale was a leading figure on the Senate Intelligence Committee. He knows the area well and has the integrity and the intellect to move through the minefield of conflicting interests.

Rigidity sets in an administration after six months, and the time to act is now. If they do not establish a momentum for reform now, our friends inside will emerge in four or eight years wondering how they could, in the end, have made such a small difference. ■

Point Of View

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First Principles
is published by the
Project on National
Security and Civil
Liberties, which is
sponsored by the
American Civil Liberties
Union Foundation and the
Center for National
Security Studies of the
Fund for peace.

122 Maryland Avenue, N.E., Washington, D.C. 20002
(202) 544-5380

Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad.

JAMES MADISON TO THOMAS JEFFERSON, MAY 13, 1798

Point of View

The Carter Administration: In the Mood for Reform?

MORTON H. HALPERIN

As we enter the third month of the Carter Administration there is a mood of uncertainty for those of us still on the outside and concerned about restoring constitutional controls on the intelligence agencies.

It remains very unclear what the center of gravity of this new administration will be—signs are everywhere but they point in very different directions. It is possible to prove that nothing has changed, that things will go on as before. And it is equally possible to believe that everything has changed, that we are governed by a group of men and women with a deep commitment to civil liberties. And it is possible that it is too soon to tell just what will happen.

Let's start with the optimists' view of the new mood. The clearest sign of change is the people. When an ACLU delegation called first on the Attorney General and later on White House issues coordinator Stu Eisenstadt, we were surrounded by old friends who were the staff assistants of Bell and Eisenstadt and who used to toil with us from the outside on these issues. The very fact of access is new. Where Levi refused even to meet with us on the national security wiretap bill or the domestic intelligence guidelines, there is now ready access. Meetings at high levels are arranged and at lower levels there is a steady flow of information and ideas.

There are even a few tangible acts. Most notable is the letter to Mel Wulf, Philip Agee's lawyer, which indicated that Agee will not be indicted for what is written in his book on life in the CIA. Agee will now be coming back to lecture and that is certainly a victory for the First Amendment.

The case for the pessimists is longer. The President failed to give Sorenson the support he needed and then appointed as CIA director a man with no record of sensitivity to civil liberties issues. Admiral Turner at his confirmation hearing reported the judgment of the Carter administration that no legislation is now needed to control the intelligence agencies and he promised to submit legislation making it a crime for officials to leak information related to intelligence sources and methods.

Carter tried to supress the story about intelligence payments to foreign leaders, denounced the story when

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Collective Impressions Printing
1638 R Street NW
Washington, DC 20009
234-4118

Typesetting by
Unicorn Graphics,
Silver Spring, Md.